

GREGORY F. MULLALLY, ) 2:05-cv-00154-BES-GWF  
Plaintiff, )  
v. )  
DANIEL A. JONES; DON W. JONES, et al., ) **ORDER**  
Defendants. )

Presently before this Court is a Motion to Dismiss for Lack of Personal Jurisdiction (#110) filed by Defendants KDMS International, LLC (“KDMS”) and RealTime Gaming Holding Company, LLC (“RealTime”) on June 30, 2006. The Court has also considered a Motion to Dismiss for Lack of Personal Jurisdiction (#113) filed by Boss Media, AB (“Boss Media”) on July 7, 2006. On July 25, 2006 Plaintiff filed a Consolidated Opposition (#128) to both motions. Defendants filed a combined Reply (#139) on August 10, 2006.

Plaintiff, an individual residing in Arizona, brought this action for patent infringement and declaratory relief against twenty-one defendants, including KDMS and its holding company, RealTime, (collectively referred to herein as the “RealTime Defendants”), and Boss Media. Plaintiff’s action centers on the allegation that he owns the exclusive Internet rights to two casino games, “Caribbean Stud Poker” and “21 Superbucks” (the “Intellectual Property”), which are allegedly covered by one or more of eleven patents. Plaintiff allegedly obtained these rights pursuant to a June 8, 1998 agreement between Plaintiff and Defendant Daniel Jones. According to Plaintiff, Daniel Jones and his son, Defendant Don Jones, thereafter

1 began selling additional licenses to use the Caribbean Stud game on the Internet, through  
2 Defendant Games Marketing Limited ("GML") and with assistance from Defendants Mikohn  
3 Gaming Corp. ("Mikohn"), Progressive Games, Inc. ("PGI") and Gametek, LLC ("Gametek").

4 Through a series of purported assignment transactions occurring during the Summer  
5 of 2000, the Jones Defendants, Gametek and GML allegedly sold several non-exclusive  
6 licenses to use the Carribean Stud game on the Internet. These non-exclusive licenses were  
7 sold to the so-called Licensee Defendants named in this lawsuit, including the RealTime  
8 Defendants and Boss Media.<sup>1</sup> In turn, the RealTime Defendants and Boss Media have sub-  
9 licensed rights to the Carribean Stud game to their foreign customers and clients.

10 **A. Jurisdictional Facts Related to RealTime Defendants**

11 The jurisdictional facts related to the RealTime Defendants are as follows.<sup>2</sup> Both  
12 Defendants are organized under the laws of Georgia (KDMS is also organized under the laws  
13 of Delaware) and have their principal places of business in Atlanta, Georgia. KDMS conducts  
14 development, production, marketing and license sales of systems for digitally distributed  
15 gaming entertainment operators. All of KDMS' sixty-nine employees work in Atlanta, Georgia.  
16 As the holding company for KDMS, RealTime conducts no ongoing business operations and  
17 has no employees or customers.

18 On or about October 22, 2001, KDMS entered into a licensing agreement with  
19 Defendant GML, a corporation organized under the laws of Ireland and having places of  
20 business in Ireland and Kentucky, for rights to the Caribbean Stud Poker game. The  
21 agreement is governed by the laws of the State of New York. An amendment to the  
22 agreement was entered into on May 5, 2006, whereby all rights in the original agreement were  
23 assigned to Defendant Progressive Games Partners, LLC ("PGP"), a limited liability company  
24 organized under the laws of the Isle of Man. The laws of England and Wales govern the terms

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26 <sup>1</sup> Plaintiff believes that the Licensee Defendants purchased their licenses without actual  
27 knowledge of Plaintiff's alleged exclusive rights to the Intellectual Property.

28 <sup>2</sup> In support of their Motion to Dismiss, the RealTime Defendants have proffered declarations  
from Michael Staw, the manager of RealTime, and Michael McMain, chief executive officer of KDMS.

1 of the May 5, 2006 agreement. KDMS states that it does not make its gaming products  
2 available anywhere in the United States because online gaming is generally prohibited in the  
3 United States. Accordingly, KDMS' sole licensee, Montana Overseas, S.A., is a Panamanian  
4 company which conducts its operations from Costa Rica. Montana Overseas pays KDMS a  
5 royalty for the right to sub-license KDMS' software to third-parties, but none of these sub-  
6 licensees are located in the United States.

7 The RealTime Defendants have never designed, manufactured or distributed software  
8 in Nevada. Additionally, these Defendants have never maintained any offices, mailing  
9 addresses, telephone listings, bank accounts, or other tangible personal or real property in  
10 Nevada, and they have never paid taxes in Nevada. KDMS employees and owners of  
11 RealTime have traveled to Nevada occasionally to participate in the G2E gaming trade show,  
12 but these visits were unrelated to the licenses at issue in this case.

13 **B. Jurisdictional Facts Related to Boss Media\_**

14 The jurisdictional facts related to Boss Media are as follows.<sup>3</sup> Boss Media is a  
15 corporation organized under the laws of Sweden, with its principal place of business in Vaxjo,  
16 Sweden. Like the RealTime Defendants, Boss conducts development, production, marketing,  
17 and license sales of systems for digitally distributed gaming entertainment operators. All of  
18 Boss Media's 220 employees work in Sweden and England.

19 On or about August 5, 2005, Boss Media entered into a licensing agreement with GML,  
20 a corporation organized under the laws of Ireland and having places of business in Ireland and  
21 Kentucky, for rights to Internet games, including Caribbean Stud Poker. The agreement is  
22 governed by the laws of the United Kingdom. An amendment to the agreement was entered  
23 into on April 21, 2006, whereby all rights in the original agreement were assigned to PGP, a  
24 limited liability company organized under the laws of the Isle of Man. The laws of England and  
25 Wales govern the terms of the April 21, 2006 agreement.

26 Boss Media has never designed, manufactured or distributed software in Nevada and  
27 \_\_\_\_\_

28 <sup>3</sup> In support of its Motion to Dismiss, Boss Media has proffered a declaration from Johan Berg, the Chief Executive Officer of Boss Media.

1 has not sold any licenses or other products to any entity in Nevada. Additionally, Boss Media  
2 states that it does not make its products available anywhere in the United States because  
3 online gaming is generally prohibited in the United States. Accordingly, of its approximately  
4 forty customers who license its software, none are located in the United States. Boss Media  
5 never maintained any offices, mailing addresses, telephone listings, bank accounts or other  
6 tangible personal or real property in Nevada, and has never paid taxes in Nevada. Boss  
7 Media employees have traveled to Nevada occasionally to participate in the G2E gaming trade  
8 show.

9 On May 8, 2006 Plaintiff filed his Amended Complaint (#69), in which the following  
10 claims are asserted: (1) breach of contract; (2) unjust enrichment; (3) conversion; (4) civil  
11 conspiracy; and (5) patent infringement, in violation of 35 U.S.C. §§ 271, 281, 283, and 284.  
12 Plaintiff also seeks declaratory relief, an injunction, and the imposition of a constructive trust  
13 over the Intellectual Property.

## 14 II. ANALYSIS

15 Boss Media and the RealTime Defendants move for dismissal pursuant to FRCP  
16 12(b)(2) for lack of personal jurisdiction. As an initial matter, the Court notes that Federal  
17 Circuit, rather than Ninth Circuit, law must be applied to determine whether a court has  
18 personal jurisdiction over an out-of-state defendant accused of patent infringement. See  
19 Breckenridge Pharmaceutical, Inc. v. Metabolite Laboratories, Inc., 444 F.3d 1356, 1361 (Fed.  
20 Cir. 2006) (“the issue of personal jurisdiction in a declaratory action for non-infringement is  
21 ‘intimately related to patent law’ and thus governed by Federal Circuit law regarding due  
22 process.”); see also Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found., 297  
23 F.3d 1343, 1348 (Fed. Cir. 2002). Where, as here, disposition of the personal jurisdictional  
24 question is based on affidavits and other written materials, the plaintiff need only make a prima  
25 facie showing that the defendants are subject to personal jurisdiction. Trintec Industries, Inc.  
26 v. Pedre Promotional Products, Inc., 395 F.3d 1275, 1282 (Fed. Cir. 2005). The district court  
27 must construe all pleadings and affidavits in the light most favorable to the plaintiff. Trintec  
28 Industries, 395 F.3d at 1282-83. Where a district court concludes that the existing record is

1 insufficient to support personal jurisdiction and the plaintiff demonstrates that it can  
2 supplement its jurisdictional allegations through discovery, the plaintiff is entitled to  
3 jurisdictional discovery. Id.

4 “Determining whether personal jurisdiction exists over an out-of-state defendant  
5 involves two inquiries: whether a forum state's long-arm statute permits service of process,  
6 and whether the assertion of personal jurisdiction would violate due process.” Inamed Corp.  
7 v. Kuzmak, 249 F.3d 1356, 1359 (Fed. Cir. 2001). Because Nevada’s long-arm statute is  
8 coextensive with the due process principles of the United States Constitution, the two inquiries  
9 collapse into a single inquiry as to whether jurisdiction comports with due process. Inamed,  
10 249 F.3d at 1360; see also N.R.S. § 14.065.

11 A court may exercise personal jurisdiction over a defendant where the defendant has  
12 “minimum contacts” with the forum “such that the maintenance of the suit does not offend  
13 traditional notions of fair play and substantial justice.” International Shoe Co. v. Washington,  
14 326 U.S. 310, 316 (1945). These minimum contacts can give rise to either general or specific  
15 jurisdiction. LSI Industries, Inc. v. Hubbell Lighting, Inc., 232 F.3d 1369, 1375 (Fed. Cir. 2000).  
16 General jurisdiction exists where a defendant maintains “continuous and systematic” ties with  
17 the forum state, even if those ties are unrelated to the cause of action. Id. (citing Helicopteros  
18 Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414-16 (1984)). Specific jurisdiction  
19 exists where the claims “arise out of” or “relate to” the contacts with the forum, even if those  
20 contacts are “isolated or sporadic.” Id.

#### 21 **A. Jurisdiction Over KDMS**

22 In his Consolidated Opposition (#128), Plaintiff does not present any specific argument  
23 to establish that KDMS’ has minimum contacts with Nevada to give rise to an exercise of  
24 general or specific jurisdiction over this Defendant. Plaintiff merely points out that “RealTime  
25 Gaming is the holding company of KDMS, LLC,” presumably in an effort to impute RealTime’s  
26 contacts to KDMS for jurisdictional purposes. However, it is well-established that a parent-  
27 subsidiary relationship alone is insufficient to attribute the contacts of one entity to the other -  
28 both business entities must be regarded separately for jurisdictional purposes. See Harris

1 Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1134 (9<sup>th</sup> Cir. 2003).

2 Because it is undisputed that KDMS has no contacts with Nevada and RealTime's  
3 contacts, if any, may not be imputed to KDMS, the Court concludes that it lacks personal  
4 jurisdiction over KDMS.

5 **B. Minimum Contacts Through an Internet Website**

6 Plaintiff maintains that sufficient minimum contacts with Nevada exist to establish  
7 personal jurisdiction, primarily on the basis that Boss Media and RealTime maintain "highly  
8 interactive" websites that are accessible by Nevada residents. RealTime maintains an Internet  
9 website at "http://www.realtimemgaming.com." RealTime's website contains two interactive  
10 elements: (1) the ability to e-mail the company and other affiliate companies with questions  
11 about licensing and other general corporate inquiries; and (2) the ability to access the websites  
12 of forty of RealTime's client casinos through Internet hyperlinks contained in a "Client" menu  
13 on the homepage. However, RealTime does not provide online gaming on its own website  
14 and does not sell any products from its website.

15 Boss Media maintains a website at "http://www.bossmedia.com." Boss Media's website  
16 also contains two interactive elements: (1) the ability to fill out a form online to request to be  
17 contacted by a sales representative of Boss Media; and (2) the ability to access the websites  
18 of thirty of Boss Media's customers through Internet hyperlinks contained in a "Customer"  
19 menu on the homepage. However, Boss Media does not provide online gaming on its own  
20 website and does not sell any products from its website.

21 The Federal Circuit has not yet set forth extensive guidance on the issue of Internet  
22 activity as a basis for jurisdiction. Left without controlling authority from the Federal Circuit on  
23 this issue, and because the Ninth Circuit has developed a substantial body of law in this area,  
24 the Court finds the Ninth Circuit's approach very persuasive.

25 The Ninth Circuit applies a "sliding scale" approach to jurisdiction arising from a  
26 defendant's website. See Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 415 (9<sup>th</sup> Cir. 1997).  
27 Under the sliding scale approach, "the likelihood of personal jurisdiction [that] can be  
28 constitutionally exercised is directly proportionate to the nature and quality of commercial

1 activity that an entity conducts over the Internet.” Cybersell, 130 F.3d at 415 (citation omitted).  
2 Thus, at one end of this sliding scale, the defendant conducts business transactions over the  
3 Internet with residents of the forum and jurisdiction is almost always proper in this situation.  
4 Id. At the other end of the scale are “passive” websites, through which the defendant simply  
5 posts information to those who access the site, such as advertisements and informational  
6 pieces about the website host. Id. In the middle of the sliding scale are so-called “interactive”  
7 websites that allow the user to exchange information with the defendant’s host site. Id. In  
8 these cases, the court must examine “the level of interactivity and commercial nature of the  
9 exchange of information that occurs on the website” to determine if the defendant has  
10 purposely availed itself of the forum. Id.

### 11 **C. General Jurisdiction**

12 General personal jurisdiction “requires that the defendant have ‘continuous and  
13 systematic’ contacts with the forum state and confers personal jurisdiction even when the  
14 cause of action has no relationship with those contacts.” Silent Drive, Inc. v. Strong Industries,  
15 Inc., 326 F.3d 1194, 1200 (Fed. Cir. 2003) (quoting Helicopteros Nacionales de Colombia,  
16 S.A. v. Hall, 466 U.S. 408, 414-16 (1984)).

17 It is undisputed that the business operations of Boss Media and RealTime are located  
18 in Sweden and Georgia, respectively. Further, there is no dispute that these Defendants  
19 maintain no physical presence whatsoever in the state of Nevada. The Defendants are not  
20 registered to conduct business in Nevada and have no registered agents, employees or sales  
21 representative located in Nevada. The only possible “contacts” these Defendants have had  
22 with Nevada include a few visits to a gaming convention by employees and owners. However,  
23 these tenuous connections between Defendants and the state do not “approximate physical  
24 presence.” See Helicopteros, 466 U.S. at 411–18 (holding that the defendant’s purchase of  
25 helicopters, parts, and accessories from a Texas corporation and the defendant’s practice of  
26 sending employees to Texas for training and consultation were insufficient to subject it to  
27 general jurisdiction in Texas).

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1 According to Plaintiff, the maintenance of "highly interactive" websites may provide a  
2 basis for general jurisdiction. However, the interactive nature of Defendants' websites does  
3 not automatically lead to the conclusion that general personal jurisdiction is proper. Plaintiff  
4 must also show that the interactivity resulted in substantial and systematic contacts with the  
5 forum state. See, e.g., Revell v. Lidov, 317 F.3d 467, 471-72 (5<sup>th</sup> Cir. 2002) (finding no general  
6 jurisdiction over nonresident defendant, despite fact that defendant's website allowed users  
7 to subscribe to a journalism review, purchase advertising, and submit electronic admissions  
8 applications, because the cited contacts with the forum were not substantial); see also Home  
9 Gambling Network, Inc. v. Betinternet.com, PLC, 2006 WL 1795554 at \*4 (D. Nev. June 26,  
10 2006) (question of general jurisdiction was "not even close" in case involving non-resident  
11 defendant maintaining interactive website that allowed a bet to placed online from Nevada,  
12 because defendant had "none of the continuous and systematic contacts with Nevada that  
13 show a substantial pattern of business relations conferring general jurisdiction").

14 Given that individuals can access an Internet website from any forum, an exercise of  
15 general jurisdiction based solely on an interactive website would subject many companies and  
16 individuals to suit in essentially any court, which is untenable. There must be evidence to  
17 show that the website was systematically and continuously aimed at the forum such that an  
18 exercise of jurisdiction would comport with "traditional notions of fair play and substantial  
19 justice." Absent such evidence, this Court does not have general personal jurisdiction on the  
20 basis of Defendants' interactive websites. See Cybersell, Inc., 130 F.3d at 419-20  
21 (maintaining a website accessible to anyone over the Internet is not enough to establish  
22 jurisdiction). Accordingly, the Court finds that Boss Media's and RealTime's contacts with the  
23 District of Nevada are insufficient to support an exercise of general personal jurisdiction over  
24 these Defendants.

#### 25 **D. Specific Jurisdiction**

26 The Federal Circuit applies a three-part test to determine whether a defendant's  
27 activities are sufficiently related to the forum state to establish specific jurisdiction:  
28

1 (1) whether the defendant purposefully directed its activities at residents of the  
forum;

2 (2) whether the claims arise out of or relate to those forum-related activities; and

3 (3) whether the exercise of personal jurisdiction would be reasonable and fair.

4  
5  
6 See Akro Corp. v. Luker, 45 F.3d 1541, 1545-46 (Fed. Cir. 1995), cert. denied, 515 U.S. 1122  
7 (1995). Once a plaintiff has shown sufficient minimum contacts to satisfy the first two factors,  
8 defendants must prove that the exercise of jurisdiction is unreasonable. Electronics for  
9 Imaging, Inc. v. Coyle, 340 F.3d 1344, 1350 (Fed. Cir. 2003), cert. denied, 540 U.S. 1111  
10 (2004). Applying these principles, the Court now determines whether it may exercise specific  
11 jurisdiction over the moving Defendants.

12 Plaintiff maintains that Boss Media and RealTime have purposefully directed their  
13 activities at Nevada residents through their “highly interactive” websites, which are accessible  
14 to Nevada residents and anyone else in the world. Predictably, Plaintiff relies primarily upon  
15 the analysis set forth in Maritz, Inc. v. Cybergold, Inc., 947 F. Supp. 1328 (E.D. Mo. 1996),  
16 which is a case often cited for the proposition that an interactive website is enough to establish  
17 jurisdiction despite a lack of evidence of any actual transactions with forum residents.  
18 However, case law that has developed in this area since Maritz, including the Ninth Circuit’s  
19 Cybersell decision, rejects the broad view of jurisdiction that Plaintiff propounds. See, e.g.,  
20 Millennium Enterprises, Inc. v. Millennium Music, LP, 33 F. Supp.2d 907, 921 (D. Or. 1999)  
21 (finding that Maritz lacks the principle that a defendant must “purposefully direct” its activities  
22 at or take “deliberate action” in or create “substantial connection” with the forum state so as  
23 to provide “fair warning” that such activities may subject defendant to jurisdiction in a distant  
24 forum).

25  
26 Maintaining a website accessible to anyone, as Defendants allegedly did in this case,  
27 is not enough to show that Defendants expressly aimed their acts at the forum state. As  
28 explained in Cybersell, there must be “something more” than the mere existence of a website

1 that is visible in a forum to confer jurisdiction over the site's owner. Id. at 418; see also Trintec  
2 Industries, 395 F.3d at 1281 ("[T]he ability of District residents to access the defendant's  
3 website . . . does not by itself show any persistent course of conduct by defendant in the  
4 District"). Here, the "something more" is not present. Plaintiff does not allege that  
5 Defendants have intentionally targeted Nevada residents with the intent or knowledge of  
6 harming Plaintiff through their websites. Defendants have not encouraged Nevada residents  
7 to access their websites, and Defendants state that no part of their business was achieved in  
8 Nevada. Defendants merely maintain websites that allow users to obtain information about  
9 their companies and products, thus rendering it foreseeable that residents of Nevada, or any  
10 other state or country, could access the websites. However, it is well-established that  
11 foreseeability alone cannot serve as the constitutional benchmark for personal jurisdiction.  
12 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("[t]he foreseeability  
13 that is critical to due process analysis is . . . that the defendant's conduct and connection with  
14 the forum state are such that he should reasonably anticipate being haled into court there").  
15 The fact that Defendants' websites have links to other websites where visitors may engage in  
16 online gambling is also not helpful because the activity of those hyperlinked websites supports  
17 jurisdiction only if Defendants maintain some responsibility for or control over the activities and  
18 contents of these third-party gaming sites. See Trintec Indus., 395 F.3d at 1281 (citing Jung  
19 v. Ass'n of Am. Med. Colls., 300 F. Supp.2d 119, 132 n.5 (D.D.C. 2004) (distinguishing cases  
20 where personal jurisdiction is based upon defendant's activities on its own website from  
21 situation where third party's website was used)).

22 Accepting all of Plaintiff's contentions as true, Defendants could not reasonably  
23 anticipate being haled into court in Nevada based on their operation of websites accessible  
24 in Nevada. To exercise jurisdiction over Defendants under these circumstances would run  
25 afoul of the requirement that "[m]inimum contacts must be 'purposeful' contacts in order to  
26 'ensure that non-residents have fair warning that a particular activity may subject them to  
27 litigation within the forum.'" Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-74 (1985).

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1 Plaintiff has failed to satisfy the first prong of the Federal circuit's three-part test for specific  
2 jurisdiction. Thus, it is not necessary to analyze the second and third prongs of the test.

3 **E. Plaintiff's Request for Jurisdictional Discovery**

4 In his Opposition, Plaintiff requests that he be permitted to conduct jurisdictional  
5 discovery because "dismissal is premature and inappropriate." (Opp. (#128), p. 12). Because  
6 Plaintiff has failed to make a prima facie showing of personal jurisdiction, the Court must  
7 consider his request for jurisdictional discovery. See Commissariat A L'Energie Atomique v.  
8 Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1323 (Fed. Cir. 2005) (finding that plaintiff in  
9 patent infringement suit had preserved discovery request by raising it in response to motion  
10 to dismiss for lack of personal jurisdiction). "Such discovery is appropriate where the existing  
11 record is 'inadequate' to support personal jurisdiction and a party demonstrates that it can  
12 supplement its jurisdictional allegations through discovery." Trintec, 395 F.3d at 1283.

13 Plaintiff laments that "[d]efendants are newly named defendants in this lawsuit, and as  
14 such there has been no discovery conducted into the nature of Defendants' business." (Opp.  
15 (#128), p. 11). However, Plaintiff has only generally requested such discovery, without  
16 explaining how such discovery would bolster its contentions, and Plaintiff has not persuaded  
17 the Court that such discovery is warranted in this case. Thus, Plaintiff's request for  
18 jurisdictional discovery is denied.

19 **III. CONCLUSION**

20 Based on the foregoing, IT IS HEREBY ORDERED that the Motion to Dismiss for Lack  
21 of Personal Jurisdiction (#110) filed by Defendants KDMS and RealTime is GRANTED.

22 IT IS FURTHER ORDERED that the Motion to Dismiss for Lack of Personal Jurisdiction  
23 (#113) filed by Boss Media is GRANTED.

24 DATED: This 28<sup>th</sup> day of February, 2007.

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28 United States District Judge